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September 3, 2004

Via Email and Facsimile

Hon. John Howe, Mayor
and Hon. Members of the City Council
City of Sunnyvale
P. O. Box 3707
Sunnyvale, California 94088-3707

Re: Appeal of Planning Commission Action
Appellant: AT&T Wireless/Velocitel
Property Location: 1259 Birchwood Drive
Case No. 2004-0471
Date of Hearing: September 14, 2003

Dear Mayor Howe and Council Members:

As counsel for AT&T Wireless, we write in support of our client's appeal of an extraordinarily burdensome condition of approval imposed at the last minute by the Planning Commission to its approval of AT&T Wireless' application to collocate on an existing telecommunications facility located at 1259 Birchwood Drive. The condition, that AT&T Wireless must "replace or incorporate a camouflage design to the existing monopole," was added without any prior notice after the close of the public hearing at the Commission's July 26, 2004 hearing. This condition was added despite the fact that Planning Department staff had recommended approval of AT&T Wireless' proposal to attach six flush mounted antennas to the existing pole, and the fact there was no public opposition to AT&T Wireless' proposal before or during the July 26th hearing.

As set forth in more detail below, this "camouflage design" requirement should be removed and AT&T Wireless' application be approved as recommended by the Planning Department Staff because:

- * Any "camouflage design" would actually worsen the visual impact of the existing telecommunication facility;
- * Replacing the existing pole would be cost-prohibitive, disruptive to the existing carriers, and unjustified; and
- * The "camouflage design" condition exceeds the City's authority under both state law and the U.S. Constitution.

Before beginning our discussion of the issues involved, we would like to point out that in late 2003, AT&T Wireless was forced to appeal exactly the same issue presented in this appeal under virtually identical facts (*See Minutes of Sunnyvale City Council and Redevelopment Agency Meeting of December 16, 2003, Item RTC-03-435, a copy of which is enclosed for your reference.*) In that case, after the close of public hearing, the Planning Commission added without prior notice the same camouflage design condition to its approval of AT&T Wireless' proposed collocation on an existing tower. After

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Planning Department Staff presented the Planning Commission's position and a brief public hearing, this Council voted unanimously in favor of AT&T Wireless' appeal and rejected the Planning Commission's requirement that the existing monopole be replaced by a new "camouflaged" pole. We ask that you take the same action in this case.

Discussion

In the present case, the existing 90 foot monopole located in an industrial park at 1259 Birchwood Drive already hosts antennas used by three other wireless telecommunications carriers. AT&T Wireless originally proposed adding six panel antennas to the existing tower in a single standard non-flush-mounted array at the 58 foot level. Planning Department Staff recommended that the design be changed slightly by requiring that the antennas be installed in two flush-mounted arrays of three antennas each in order to limit the visual obtrusiveness of the site. (See enclosed photo simulations of the design as approved by Planning Department Staff.) Though not optimal, AT&T Wireless was (and is) ready and willing to proceed with the flush-mounted design as approved and recommended by Planning Department Staff.

In its report prepared for the July 26, 2004 hearing, City staff recommended approval of the six flush-mounted antennas design, finding, among other things, that:

The proposed antennas meet the visual standards established by the city for telecommunications facilities as the proposed antennas make use of an existing monopole. . . . As recommended by staff, the antennas would be flush-mounted to the existing monopole. Staff finds that the antennas will not cause an additional negative aesthetic impact to the surrounding industrial area. (See Finding 2 of "Recommended Findings" included as Attachment 1 to Planning Department Staff Report prepared for the July 26, 2004 Planning Commission hearing)

The Planning Department Staff findings were confirmed by the complete absence of public opposition to the AT&T Wireless collocation proposal at the July 26th hearing on aesthetic or any other grounds. Despite the staff recommendation and the complete absence of controversy, the Planning Commission, after the public hearing was closed, imposed its requirement that in order for the project to go forward, AT&T Wireless must "replace or incorporate a camouflage design to the existing monopole." In the Commission's discussion after the close of the public hearing, the only stated reason for the imposition of the condition was to mitigate the fact that the tower is visible from a freeway. (See Minutes of Planning Commission Meeting of July 26, 2004).

I. The "Camouflage Design" condition worsens rather than mitigates the visual impact of the existing facility.

In practice, the only camouflage design for a 90-foot monopole is a faux tree, or "tree pole."¹ Given the fact that there are already three carriers with antennas on the pole, and the location of those antennas on the pole, in order to hide the antennas in the "branches"

¹ "Tree poles" come in two basic varieties – faux palms or evergreens. In this case, because the pole must accommodate four carriers, a faux palm is completely unworkable. Monopoles can be disguised as flagpoles, but again, because the pole in this case must be at least 90 feet tall and accommodate the antennas of four carriers, the resulting pole would be a prohibitively expensive column perhaps three or four feet in diameter.

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of a tree that would bear any resemblance at all to a natural tree, the overall height of the pole would have to be extended by at least 10 to 15 feet bringing the total to at least 100 feet.² While the existing 90 foot monopole (with or without AT&T Wireless' antennas) may be visible from some freeway, it does not at all follow that making the entire structure 10 to 15 feet taller and decorating it as a tree in an industrial park with no natural trees of similar size in the vicinity would in any way mitigate the visibility of the pole. The effect, in fact, would be just the opposite. For this reason alone, the Commission's "camouflage design" condition should be rejected.

II. Replacing the existing pole is cost-prohibitive, disruptive to the operations of the other carriers and the site, and unjustified.

AT&T Wireless uses stealth designs wherever possible, including, in appropriate circumstances, tree poles. In this situation, however, replacing the existing pole with a new tree pole would be cost-prohibitive.

Two factors add significantly to the cost of replacing the existing pole with a tree pole. First, a tree pole of this height would be quite costly. The estimated cost of a tree pole is approximately \$1,100 per foot. A 100 foot tree pole would therefore cost approximately \$110,000.

Secondly, installing a new pole would require relocating the three existing carriers to a temporary pole while the existing pole is removed and the new pole is installed in its place. These carriers – understandably – will not tolerate any interruption in their service, which adds significantly to the cost of relocating them. Based on previous experience with other collocations, our client estimates the cost of relocating the existing carriers at about \$20,000 per carrier for a total in this case of \$60,000.

The condition in question, therefore, would add approximately \$170,000 to the cost of the facility. Such costs may be justified if our client were creating unacceptable visual impacts. As noted above, however, that is not the case. In fact, as noted above, Planning Commission Staff found that the additional antennas would not significantly increase the visual impact of the existing facility. Furthermore, as we have already explained, the camouflage design condition would not ameliorate any visual impact caused by the addition of AT&T Wireless' antennas to the existing pole (assuming such existed), but would in fact create an impact far more negative than currently exists.

III. The "Camouflage Design" condition exceeds the City's authority under both state law and the U.S. Constitution.

Under these circumstances, the challenged condition appears to be inconsistent with both state law and the U.S. Constitution. California Government Code Section 65909 requires that conditions on land use permits be "reasonably related" to the impact of the

² We should also note that an antenna tower in excess of 100 feet would require a variance from height restrictions under the planning code. In this particular case, because of the location of the upper-most set of antennas on the existing tower, it may not be possible to create anything other than a flat-top tree in order to remain under the height limitation. Applying for and obtaining a variance in order to build a "tree-pole" of more than 100 feet would greatly delay and increase the cost of the project, and quite possibly result in its denial. When the issue of a need for a variance arose in last December's appeal referenced above, Planning Department Staff at that time made clear that they would not support any such variance.

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planned project. The California Supreme Court has interpreted this provision as embodying and incorporating the requirements of an "essential nexus" and "rough proportionality" established by the United States Supreme Court in Nollan v. California Coastal Comm'n. (1987) 483 U.S. 825, and Dolan v. City of Tigard (1994) 512 U.S. 374. (Ehrlich v. City of Culver City (1996) 12 Cal.4th 854, 860, 866-67.)


As explained above, there is no nexus between the condition and any impact of the proposed facility. Even assuming (strictly for purposes of discussion) that our client's proposal to attach six flush-mounted antennas to the existing monopole has some negative impact, the cost of complying with the camouflage condition is completely out of proportion to any alleged impact (ignoring for a moment that the camouflage condition would actually worsen any visual impact). In short, the challenged condition is not only counter-productive and cost-prohibitive, it exceeds the City's authority under both state law and the U.S. Constitution.

Conclusion

The "camouflage design" condition should be rejected for the reasons set forth above and the project should be approved as recommended by the Planning Department Staff in its report prepared for the July 26, 2004 Planning Commission hearing.

I look forward to seeing you at the hearing on September 14th, and to answering any questions you may have.

Sincerely,



Charles R. Martel

Enclosures

cc (via email only):

Trudi Ryan (Planning Director)
Ryan Kuchenig (Planning Department – Project Planner)
Valerie J. Armento, Esq. (City Attorney)
Howard Yee (consultant for AT&T Wireless)
Daniel E. Smith, Esq. (AT&T Wireless)
Robert Smith (Crown Castle)

**MINUTES
SUNNYVALE CITY COUNCIL AND REDEVELOPMENT AGENCY
DECEMBER 16, 2003**

The City Council of the City of Sunnyvale adjourned from a 5:00 p.m. Study Session regarding Proposed Public Safety Special Operations Program Restructure, a 6:00 p.m. Study Session regarding City/MTA Highway 237 Corridor Study, and met in regular session in the City Council Chambers, 456 West Olive Avenue, Sunnyvale, CA at 7:30 p.m. with Mayor Howe presiding.

SALUTE TO THE FLAG

Mayor Howe led the salute to the flag.

ROLL CALL

PRESENT:

Mayor John Howe
Vice Mayor Dean Chu
Councilmember Fred Fowler
Councilmember Julia Miller
Councilmember Ron Swegles
Councilmember Melinda Hamilton
Councilmember Otto Lee

Staff Present:

Robert LaSala, City Manager
Amy Chan, Assistant City Manager
Chuck Schwabe, Deputy City Manager
Valerie J. Armento, City Attorney
Robert Paternoster, Director of Community Development
Trudi Ryan, Planning Officer
Erin Walters, Associate Planner
Coryn Campbell, Neighborhood & Community Services Manager
Brice McQueen, Redevelopment Manager
Cathleen McKay, Interim City Clerk

PUBLIC HEARINGS/GENERAL BUSINESS

3. RTC 03-435 AT&T Wireless [Appellant] - Appeal of a Decision by the Planning Commission Approving a Use Permit to Allow an Additional Antenna Array to an Existing Monopole

Trudi Ryan, Planning Officer, presented the staff report. She stated this proposal is to allow co-location of six panel antennas on an existing telecommunications monopole at 375 North Pastoria Avenue. The original application requested an extension to the monopole to a height of 113 feet, which would have required the approval of a variance. Staff has worked with the applicant to reduce the overall height to 100 feet. A Negative Declaration has been prepared in compliance with the California Environmental Quality Act provisions and City Guidelines. An initial study has determined that the proposed project would not create any significant

environmental impacts. The proposed use is for a co-location of six panel antennas to an existing 90-foot monopole. This project results in a fifth co-location and a total of 27 panel antennas for the monopole. The proposal would also extend the height of the monopole an additional 10 feet to a total of 100 feet. Any proposed increase to the existing tower over 100 feet would require a Variance application subject to approval from the Planning Commission.

Mayor Howe opened the Public Hearing at 9:38 p.m.

Jim Heard, attorney for AT&T Wireless, stated the application started with a request to extend an existing 90 foot monopole by 20 feet which was not supported by staff. The current proposal of 100 feet meets all the code requirements and he recommended approval. He spoke in opposition to Condition of Approval 15 for the antenna pole to be replaced with a camouflage design stating it will not accomplish the goal of the Planning Commission and was expensive.

Robert Smith, representing Crown Castle, and Ms. Ryan responded to questions from the Council regarding room for another set of antennas, cost sharing, the visual blight of the pole, and Radio Frequency (RF) cumulative exposure. City Attorney Armento suggested that costs should be more equitably shared and Council might want to consider a revision to the ordinance.

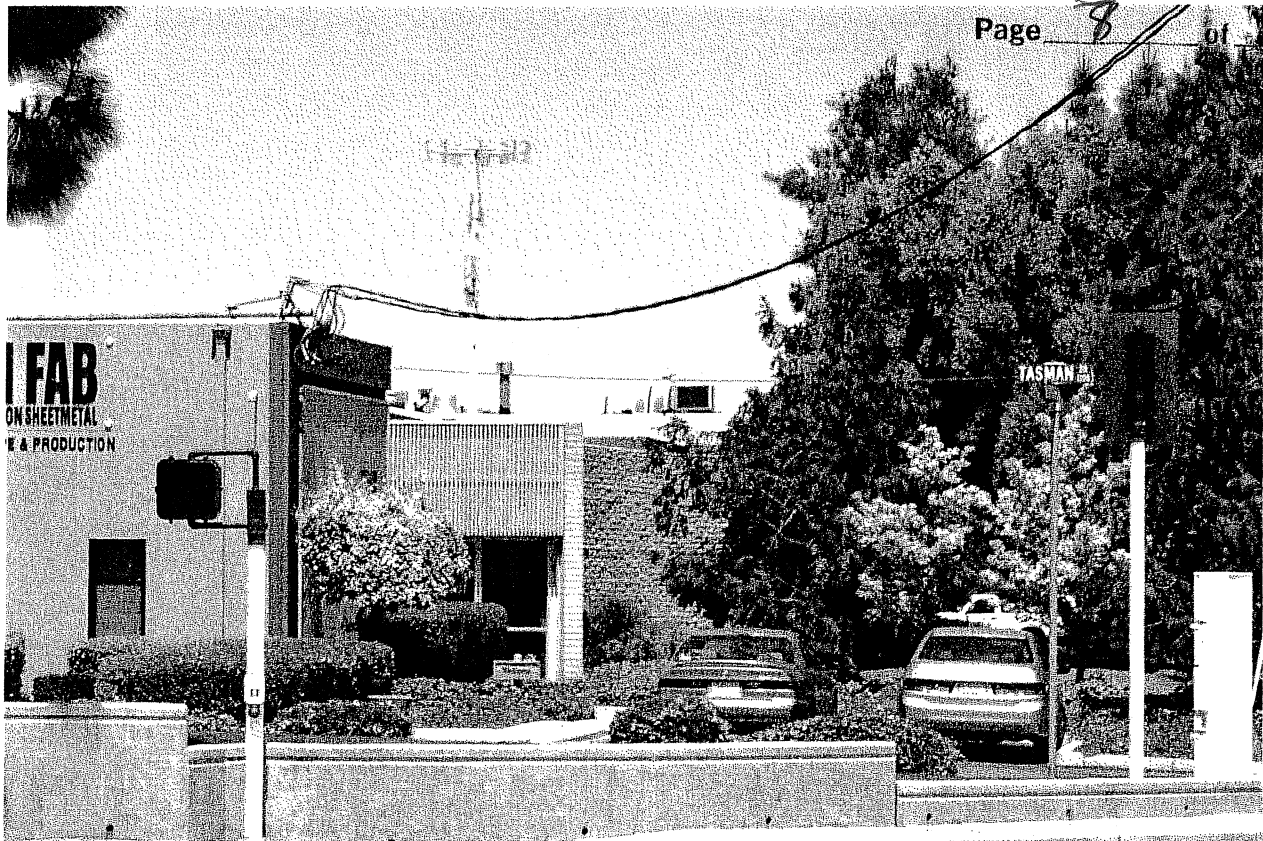
Councilmember Miller requested a map of where the poles are located.

Jim Heard, attorney for AT&T Wireless, stated there is a study included that addresses a cumulated analysis of RF exposure included in the application.

Mayor Howe closed the Public Hearing at 9:46 p.m.

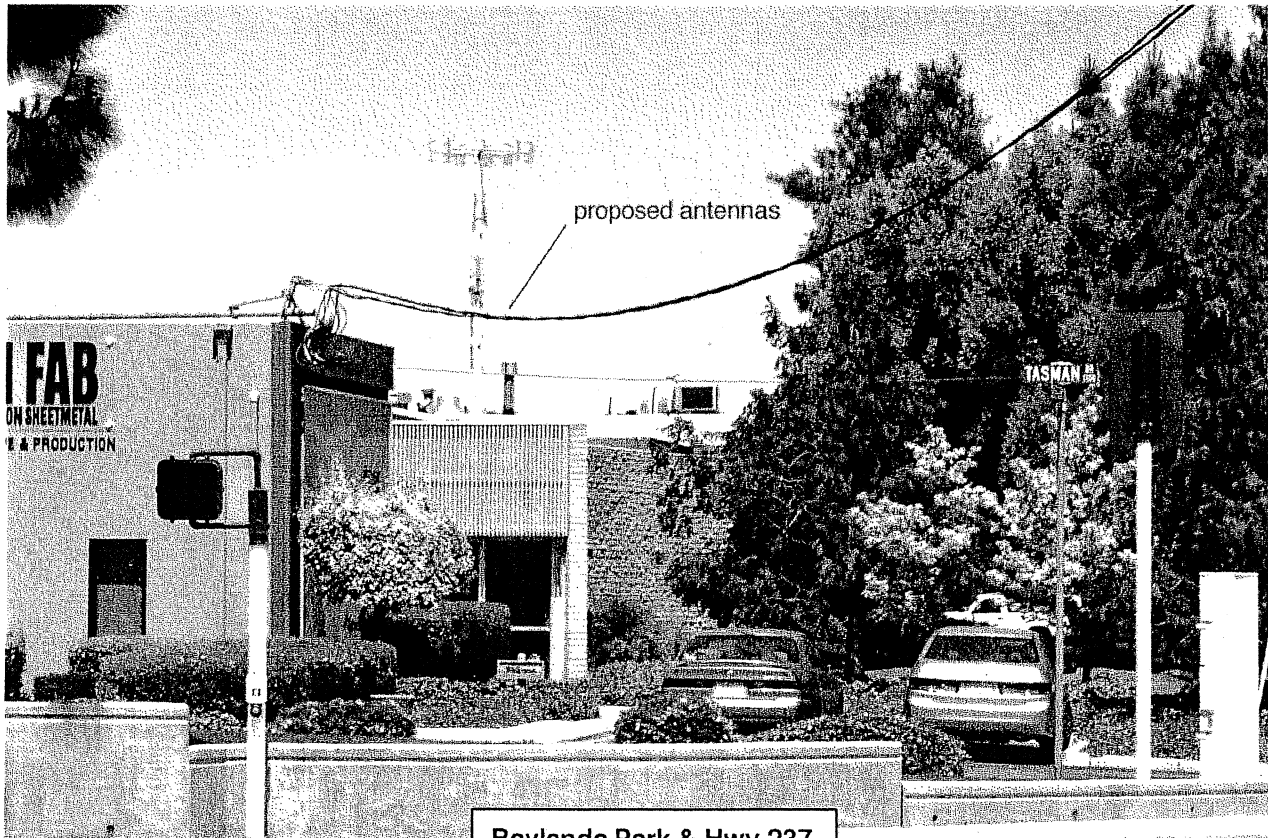
Councilmember Fowler and Councilmember Hamilton agreed to co-sponsor a Study Issue on Funding Mechanism for Aesthetic Upgrades to Telecommunications Towers. Staff was directed to prepare a Study Issue Paper for the Study Issues Workshop on December 18.

Councilmember Swegles moved, and Mayor Howe seconded, to Affirm the Negative Declaration and approve the proposed project subject to Conditions of Approval in accordance with staff's recommendation with the exception of condition 15 which is to be removed. The motion carried unanimously.



Existing

Looking North from Tasman Drive



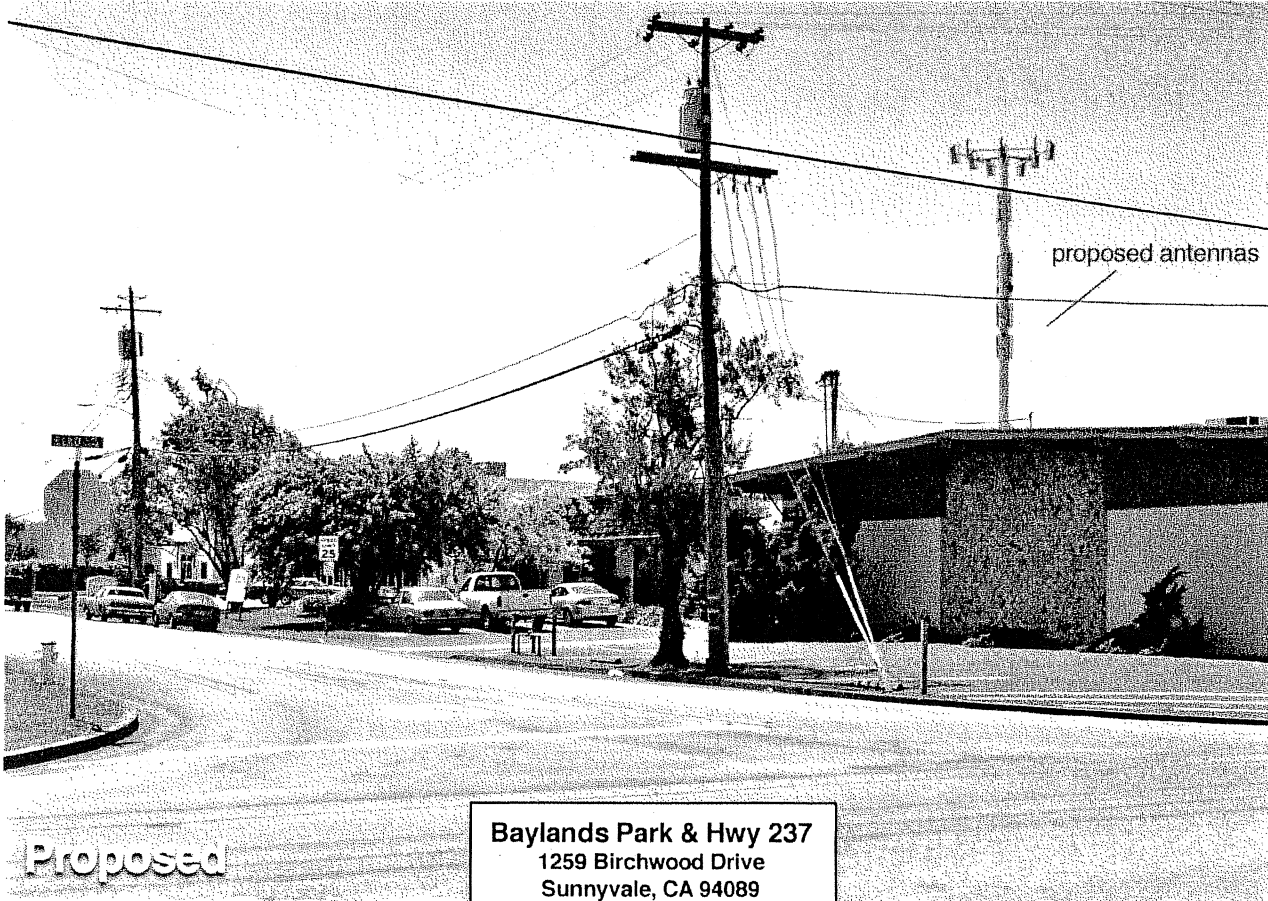
Proposed

Baylands Park & Hwy 237
1259 Birchwood Drive
Sunnyvale, CA 94089
site # SNFCCA2051C



Existing

Looking South from Elko Drive



proposed antennas

Proposed

Baylands Park & Hwy 237
1259 Birchwood Drive
Sunnyvale, CA 94089
site # SNFCCA2051C